(12)

No. 03-526

IN THE

Supreme Court of the United States

DORA B. SCHRIRO,
DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* MURDER VICTIMS' FAMILIES FOR RECONCILIATION, MS. SUSAN HILL, AND MS. SALLY SCHAUBLE IN SUPPORT OF RESPONDENT

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STATEMENT OF *AMICI CURIAE* INTERESTS

Murder Victims' Families for Reconciliation ("MVFR") is a victim-founded, victim-staffed national organization of family members of murder victims who oppose the death penalty. MVFR supports programs that address the needs of victims of violence, enabling them to heal and rebuild their lives. MVFR also advocates for programs and policies that reduce the rate of homicide and promote crime prevention and alternatives to violence. MVFR works to ensure that its members, notwithstanding their opposition to the death penalty, be treated with equal fairness, dignity, and respect under the victims' rights laws and constitutions of the states. MVFR is a member organization of the National Organization for Victim Assistance ("NOVA") and the National Center for Victims of Crime ("NCVC"), and its members are active in Parents of Murdered Children ("POMC") and the National Crime Victims Law Institute ("NCVLI"). MVFR members reside in every state, including those that will be impacted by the decision in this case.

MVFR seeks to provide the court with the perspective of murder victims' survivors who believe that a judicial ruling on the retroactive application of the Sixth Amendment principles announced in *Ring v. Arizona*, 536 U.S. 584 (2002), does not have a direct bearing on the ability of survivors to heal and rebuild their lives.[1]

Susan Hill's father and stepmother were shot in their home in Yuma, Arizona during a home invasion. Her

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[1] Murder Victims' Families for Reconciliation files this brief with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with this Court. Counsel for Murder Victims' Families for Reconciliation authored this brief in its entirety. No counsel for any party authored this brief in whole or in part, and no person or entity, other than Murder Victims' Families for Reconciliation and its members made monetary contribution to the preparation or submission of this brief. This brief is authored by two MVFR members who are themselves family members of murder victims.

stepmother was killed and her father was handicapped as a result of the attack. Their attackers, Fred Robinson, Jimmy Lee Mathers, and Theodore Washington, were each convicted and sentenced to death for the crime.[2] One of the attackers, Mathers, was acquitted on appeal. Robinson and Washington are on death row in Arizona. Robinson was Ms. Hill's ex-husband; he had physically and emotionally abused her and, twice, after she left him, kidnapped her and forced her to return to his home. Ms. Hill is an MVFR member and, as a victim under the Arizona Constitution[3] and Arizona state law,[4] has an interest in the outcome of this case.

Sally Schauble's mother, Jacqueline Appelhans, and Dean Morrison were shot to death after being forced to lie face down on the floor of their home during a robbery. Their attackers, Robert and Roger Murray, were convicted and sentenced to death.[5] The Murrays are currently on death row in Arizona. Ms. Schauble is an MVFR member and, as a victim under the Arizona Constitution and Arizona state law, has an interest in the outcome of this case.

Amici support Respondent in his effort to ensure that those who were sentenced to death pre-*Ring* are afforded their full constitutional rights.

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[2] *See State v. Robinson*, 796 P.2d 853 (Ariz.1990).

[3] ARIZ. CONST. art. II, ¢ 2.1 (c). "Victim" means a person against whom the criminal offense has been committed or if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused. MVFR's own definition is family members of victims of homicide.

[4] Ariz. Rev. Stat. Ann. ¢ 13-4401, *et seq.*

[5] *See State v. Murray*, 906 P.2d 542 (Ariz. 1995).

INTRODUCTION AND SUMMARY OF ARGUMENT

The impact of a murder on the victim's family is immeasurable. The victims' rights laws of the states are essential in helping to ensure that murder victims' survivors are provided information, treated with respect, and allowed to have limited inclusion in the criminal justice process. But survivors do not have a "right" to have a certain sentence given or upheld. The Court has not been asked to determine whether state constitutional rights for victims are a compelling state interest which require limiting a defendant's constitutional rights.

The constitutional principles that this Court has held must govern sentencing proceedings in capital cases should be applied retroactively, unless there is a compelling governmental interest that justifies carrying out death sentences that were imposed by procedures now recognized to be unconstitutional. It is not possible to conclude that all, or even a majority of, survivors of murder victims have a compelling need to see such death sentences carried out.

The surviving family members of murder victims have a variety of different needs with respect to the emotional, physical, and economic harm they have suffered as a result of their violent losses. Moreover, they have diverse beliefs about the moral and legal legitimacy of the death penalty. It is impossible to say how all survivors would feel by the overturning of the death sentences that were handed down under an unconstitutional sentencing scheme. The Victims' families represented by this brief believe that constitutional guarantees should extend to those convicted defendants now on death row.

The process of healing that victims' families go through is not analogous to, and does not depend upon, the concept of finality that is a jurisprudential consideration for the court system. The process of recovery for the majority of survivors of murder victims must take place largely independent of any legal judgment or penalty. "Closure" is neither a legal notion nor even an adequate psychological notion. The process

of reconciling oneself to the reality of the violent loss of a family member is a complex and highly individualized process that cannot be addressed by proceedings in the criminal justice system. Furthermore, there is a paucity of empirical evidence about what effects executions actually have on this process.

Moreover, when punishment becomes the primary focus of discussions about "closure," there is a risk that an ostensible concern for victims' rights may become a cloak for advancing policy arguments that favor prosecution goals. Any such exploitation of victims' rights would render suspect the argument for the imposition of the death penalty in a given class of cases based on the supposed benefit of closure or resolution for survivors.

ARGUMENT

I. SURVIVORS OF MURDER VICTIMS ARE NOT ENTITLED TO A FINALITY TO JUDICIAL PROCEEDINGS THAT COMES AT THE EXPENSE OF CONSTITUTIONAL FAIRNESS.

Members of MVFR have been forced to learn that, following a murder, surviving family members must deal both with the loss of a family member and with the criminal justice process.[6] MVFR members, through personal experience, understand the difficulties of having to navigate the criminal justice system during the years in which their grief at the loss of a loved one is at its greatest. They know the anger, hurt, and desperation that family members feel after a murder, and that holding the killer accountable for his or her acts gives surviving family members a needed sense of safety, and

[6] See http://www.mvfr.org/index.jsp; quotation from Marie Deans, founder of MVFR. *"After a murder, victims' families face two things: a death and a crime. At these times, families need help to cope with their grief and loss, and support to heal their hearts and rebuild their lives."*

the feeling that the murder has been acknowledged by society, that the victim mattered, and that the act will not go unpunished.

Most survivors of murder victims come to understand that in murder cases the criminal justice system is slow and can be frustrating and feel unbalanced. To alleviate some of the potential for pain and frustration, it is important to keep survivors informed of the status of a case, to treat them with dignity and respect, and, when appropriate, to allow them to be heard in predetermined legal ways. The laws defining victims' rights within the states protect these interests of survivors and other crime victims.

Yet as significant as the interests of murder victims' survivors may be, they cannot be defining with respect to criminal procedures that are constitutionally mandated.[7] No victims' rights law guarantees a victim any "right" to a given sentence.[8] NOVA amici[9] mistakenly conclude that in determining whether *Ring* should be applied retroactively, it is necessary to "balance the rights of the

[7] *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (Court notes that interests of crime victims cannot be ignored, but underlines that, "Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less."). *See, also, State ex rel. Romley v. Superior Court of Maricopa County*, 836 P.2d 445, 449 (1992) (holding that when a victim's state-based rights come into conflict with a defendant's due process rights under the U.S. Constitution, the Constitutional rights are superior).

[8] *See e.g., State v. Lamberton*, 899 P.2d 939, 941-42 (1995)(holding that while the Arizona victims' rights laws and constitutional amendment give victims the right to participate and be notified of certain proceedings, they do not have the right to control the proceedings or to be parties to the proceedings.)

[9] For the sake of convenience we refer to the four victims' organizations that filed a brief in support of the position of the state in this case as the "NOVA brief."

defendants against the rights of the victims."[10] To speak about victims' rights with respect to the issue at hand is not accurate. The state properly may be concerned about the impact of criminal proceedings on victims. If such concerns are of sufficient magnitude as to constitute compelling state interests, they may be considered in determining whether it is necessary to limit the reach of a defendant's constitutional rights in certain instances.

The Sixth Amendment rights recognized by this Court in *Ring* are fundamental rights. In determining whether they must be given retroactive application, this Court must consider whether the state asserts a compelling interest that requires enforcing a sentence of death that was imposed by procedures the Court now recognizes were unconstitutional.[11] The asserted state interest here is in the finality of judicial proceedings. This Court must decide whether obtaining "the certainty that comes with an end to litigation." *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting) counsels against applying *Ring* retroactively in this case. There are substantial reasons to question whether the concern with finality that arises in ordinary criminal cases is appropriate in capital cases. The need to secure a fair and just outcome takes on a particular urgency where life hangs in the balance.

The NOVA amici proceed on the basis that murder victims' survivors have an interest in a final outcome that goes beyond the societal interest in finality. They build their argument by generalizing about what survivors need in order to heal from the emotional harm caused by the murder of a loved one. The generalizations made by the NOVA amici are

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[10] NOVA brief at 20.

[11] *See* Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. Cal. L. Rev. 1019 (1987)(analyzing the appropriate formulation of the balancing that should govern criminal procedure issues).

unsupported by any empirical research and contradicted by the experience of MVFR members and other survivors.

The process of grieving and recovery is highly individualized and it is not possible to make meaningful generalizations about the needs of all survivors of murder victims. Susan Bandes has noted that, "Assertions about what victims need are often presented as if they are empirically based. If this is indeed an empirical question about what conditions are most likely to help, we ought to be looking for empirical answers, and there are surprisingly few out there."[12] She notes that what little empirical evidence does exist "supports the intuitively obvious view that different victims have different needs, and that an individual victim's needs may change over time."[13]

Moreover, the NOVA amici have no basis for assuming that all, or even a majority, of survivors desire a resolution of criminal proceedings that comes at the expense of constitutional fairness. As Margaret Vandiver has noted, "[F]amilies of homicide victims differ widely on how they think offenders should be punished, and sometimes members of the same family, or families victimized by the same defendant, may disagree on the proper punishment."[14]

It is not possible to articulate a state interest sufficient to overcome the application of constitutional rights on the basis of general assumptions about the needs or desires of murder victims' survivors with respect to the death penalty. The argument that survivors as a class have a compelling interest against the retroactive application of *Ring* is far too speculative.

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[12] Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 Fordham Urb. L.J. 1599, 1602 (2000).

[13] *Id.*, at 1602-1603.

[14] Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in Acker, Bohm and Lanier, *America's Experiment with Capital Punishment*, 477, 497 (1998).

There is no inherent benefit that flows to such survivors from carrying out death sentences imposed under a sentencing scheme that was unconstitutional.

II. IT IS AN ABUSE OF THE CONCEPT OF FINALITY IN THE CRIMINAL PROCESS TO TREAT IT AS A PROXY OR A PRECONDITION FOR THE HEALING AND RECOVERY THAT FAMILY MEMBERS OF MURDER VICTIMS NEED.

NOVA amici have conflated the concepts of finality in the criminal process and the "resolution" of emotional issues by the survivors of murder victims. Finality, however, is a jurisprudential concept that does not translate to the process of grieving. The NOVA amici argue that the survivors of murder victims need "reasonable resolution" and that applying *Ring* retroactively would "eliminate any sense of resolution."[15] This argument falsely implies that there is "closure" or "resolution" for grief. For many survivors, the concept of "closure" does not reflect an attainable goal. Many survivors succeed, at best, in reconciling themselves to the fact of the murder.[16]

The process of recovery for the majority of survivors of murder victims must take place largely independent of any legal judgment or penalty. The death penalty in particular, because it is sought in a very small percent of all murder cases, is not relevant to most survivors. In the year 2000, there were 15,517 murders reported to the police, leading to the arrest of 11,997 people, of

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[15] NOVA brief at 5.

[16] See www.MVFR.org for definition of reconciliation within this context. The term "reconciliation" as used by Murder Victims' Families for Reconciliation refers to the idea of reconciling oneself to what has happened. As our brochure states, it means accepting that you cannot undo the murder but you *can* decide how you will respond and how you will go forward in your own life.

whom 8,600 were convicted.[17] The sentence of death was imposed in approximately 2% of those 8,600 convictions, while another 23% received a life sentence, and 75% received a term of years or probation.[18] These statistics make it plain that for the vast majority of survivors of murder victims, their healing takes place without the imposition of the death penalty. At most, what happens to the killer within the criminal justice process is only part of a survivor's process of trying to accept the violent loss of a family member.

Susan Herman, Director of the National Center for Victims of Crime, speaks of the need to create a "parallel justice," one that helps victims separate healing from the criminal justice process.[19] Recognizing that a large portion of criminal victimization goes unsolved or without a conviction, she emphasizes that "When we consider justice for victims, we must always begin and end by asking what victims need to rebuild their lives.... We should not start with the criminal justice system as our point of reference."[20]

Similarly, Susan Bandes has emphasized that we must "be careful to distinguish the question of what victims need from the question of what the legal system ought to provide."[21] She explains:

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[17] U.S. Department of Justice, Bureau of Justice Statistics, Bulletin, "Felony Sentences in State Courts, 2000," June, 2003 at 5, http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc00.pdf (last visited February 17, 2004.)

[18] *Id.* at 4.

[19] *See* National Center for Victims of Crimes. "Parallel Justice Project Launched." Released October 30, 2003. http://www.ncvc.org/press/releases/10302003.html.

[20] *See* Susan Herman "Victim Advocacy and Parallel Justice." *NETWORKS*, Vol. 15 No.3, p. 9. National Center for Victims of Crime, Summer 2000.

[21] Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 Fordham Urb. L.J. 1599, 1605 (2000).

> Some of what individual victims or survivors need to attain closure must come from psychological, religious and social support systems. Such systems have greater ability to individuate among victims and to accommodate the shifting and complex needs of particular victims. They are not obligated to reach a fixed and categorical judgment, or any legal judgment at all. Moreover, they are not obligated to weigh a host of other factors against the victim's needs, including the rights of the defendant and the good of society as a whole.[22]

Healing and recovery require an intimate focus on the particular needs of an individual survivor, a focus that it is neither appropriate nor practical to expect the legal system to provide. Vik Kanwar has noted that "individual requirements for 'closure' are so personal that it would be difficult to conceive of any generalized remedy that could be properly tailored to this purpose."[23] Of necessity murder survivors must look outside the court system for their principal sources of support. Hence, Vivian Berger concludes:

> Above all, the penalty phase of a capital trial cannot function as a substitute therapeutic environment. Acknowledging that truth in no way implies a cold or complacent attitude toward the victims of the gravest offenses. To the contrary, such a posture permits frank focus on the actual purpose of the proceeding: to determine the 'personal responsibility and moral guilt' of the defendant. At the same time, it avoids cruelly raising the expectation of succor from an inappropriate source, only to disappoint many

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[22] *Id.* at 1605-06.

[23] Vik Kanwar, *Capital Punishment as 'Closure': The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. Rev. L. and Soc. Change 215, 239 (2001-2002).

> when the system turns upon them or their dead, wholly ignores them, or (at best) offers merely partial or temporary relief.[24]

MVFR disagrees with the statement that "Many victims cannot begin the healing process until the case is behind them."[25] The NOVA amici provide no support for this contention. On the contrary, it is clear that survivors of murder victims are often forced to begin to address their emotional suffering in the *absence* of the perpetrator's conviction. Indeed, the survivors in the 45% of murder cases where no conviction is obtained do so of necessity.

Lynne N. Henderson, herself a crime victim, has challenged persuasively the notion that healing is dependent upon guilty verdicts:

> Another myth that operates throughout the victim's rights literature is that criminal cases are endlessly delayed, usually but not always by wily defense counsel, and the victim 'cannot heal' or 'put the matter behind her' until there is a final judgment of guilt. This assertion is questionable, because healing takes place whether or not an offender is ever located, much less convicted. Nor does the healing process necessarily end with the successful resolution of a case.[26]

In an earlier article, she explains why emotional "resolution" does not ultimately depend on the outcome of the criminal case:

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[24] Vivian Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 Fla. St. U. L. Rev. 21, 59 (1992) (footnote omitted).

[25] NOVA brief at 12.

[26] Lynne N. Henderson, *Revisiting Victim's Rights*, 1999 Utah L. Rev. 383, 418 (1999).

> It is simplistic to assert that the rituals of condemnation will erase so profound an experience for an individual. Continuances and delays may cause a victim to relive the event, but a victim is likely to relive portions of the event whether or not there is a delay. Issues raised by victimization do not resolve themselves quickly: A reintegration and understanding of such questions as mortality, meaning, and responsibility take time.[27]

It is not clear whether NOVA amici are making an argument that an execution itself provides necessary assistance in the healing process. Such an argument would be extremely problematic, regardless of the view that one takes toward the legitimacy of capital punishment in general. There is no reliable empirical evidence to suggest that survivors experience substantial benefits from the execution of a convicted defendant. Margaret Vandiver has called attention to the dearth of available research on this issue:

> The effects of executions on homicide victims' families simply are not known. It may be that some families experience a real and lasting sense of peace and closure from the execution of their relative's killer. Statements made by victims' survivors at the time of execution often indicate that they feel a great sense of relief. No systematic interviews have been done with these families to learn whether the execution does result in long-term improvement in their emotional condition. Some families may find that the execution does not provide them much if any comfort. In fact, losing the object of their anger may leave them feeling empty and unfocused. If they have believed for years that the execution of

[27] Lynne Henderson, *The Wrongs of Victim's Rights*, 37 Stanford L. Rev. 937, 976-77 (1985).

> their relative's killer would bring them substantial emotional relief and it does not, they may even feel worse after the execution.[28]

The problematic nature of attempting to provide survivors of murder victims with "closure" through a relationship with the criminal justice system is transparent where "closure" has become confused with "satisfaction." Kanwar has recognized the risk of confusing "closure" with "satisfaction":

> The idea of 'closure' for victims has been explored in the therapeutic context (grief and finality) and 'satisfaction' has been whispered in the context of punishment (vengeance and finality), but as victims move to the center of the criminal trial, the lines are again blurring between the two concepts.[29]

Prior to the state's assuming responsibility for criminal justice, the survivors of murder victims attempted to obtain satisfaction from the killer or his family, often through violent means. Now that criminal prosecution is handled by the public prosecutor, it is society in general that is responsible for imposing punishments. Yet to the extent that the survivors of murder victims are perceived as having a personal stake in the outcome of criminal proceedings, there is a risk that the *goal* of a proceeding becomes providing satisfaction to the victim's survivors.

It is important to recognize, as Kanwar does, that the criminal justice system may provide "satisfaction," but that it cannot supply "closure" with respect to emotional suffering:

[28] Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in Acker, Bohm and Lanier, *America's Experiment with Capital Punishment*, 477, 484-485 (1998).

[29] Kanwar, *supra*, at 238.

> Even if the notion of victim satisfaction can be a legitimate consequence of punishment, what kind of satisfaction should we aim to produce? Should we aim to provide emotional closure associated with the cessation of grief, or should we seek to achieve immediate and efficacious satisfaction to individuals who associate their need for closure with feelings of vengeance and retribution? If closure is directed at grief, then it is unlikely that legal and procedural remedies can even begin to address this powerful emotion.[30]

When punishment becomes the primary focus of "closure" discourse,[31] the ostensible concern for "victims' rights" may become a cloak for advancing policy arguments that favor prosecution goals. This tendency has been noted by several commentators.[32] Henderson has chronicled this development, concluding, "Although 'victims' rights' may be viewed as a populist movement responding to perceived injustices in the criminal

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[30] *Id.* at 241.

[31] *See, id.* at 229.

[32] *See, e.g.* Susan Bandes, *Victim Standing*, 1999 Utah L. Rev. 331, 333-334 (1999) ("the sorts of victim initiatives that have been successful have been those, and only those, that advance the prosecution's own agenda"); Robert Mosteller, *Victims' Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefitting the Prosecution*, 29 St. Mary's L. J. 1053, 1057-60 (1998)(giving examples of victims' rights that would have been enforceable against government but have been eliminated from current version of proposed Federal Victims' Rights Amendment); Lynne N. Henderson, *Revisiting Victims' Rights*, 1999 Utah L. Rev. 383, 384, ("crime control conservatives use victims and victims' rights to achieve ends other than helping victims recover"); Markus Dirk Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 Buff. L. Rev. 85, 127 (1993)("*Payne* did not respond to the arguably legitimate concerns of crime victims as much as it reflected the exploitation of these concerns in a widespread crusade against the rights of criminal defendants in general, and against those convicted of capital crimes in particular.")

process, genuine questions about victims and victimization have become increasingly co-opted by the concerns of advocates of the 'crime control' model of criminal justice."[33] Michael Radelet, a sociologist who has written several books on the death penalty, concluded, "The families get used and co-opted ... I don't even know what the term 'closure' means. Someone kills your child, there is no closure."[34] The sincerity of a stated concern for the need of survivors for resolution is certainly cast in doubt by the prosecution's mistreatment of victim family members who let it be known that they do not support the death penalty.[35]

CONCLUSION

If this Court is to consider the effect its decision may have on victims' families, it must consider the impact on all victims, not just those who may believe that their "resolution and recovery would be lost"[36] with the overturning of a death sentence. This brief demonstrates that new sentencing hearings for those defendants affected by holding *Ring* retroactive would not "have disastrous effects"[37] on all victims. Nor would retroactivity raise a "specter" that "the promise of resolution" will "vanish."[38] There is no basis for the

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[33] Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 Stanford L. Rev. 937, 951 (1985).

[34] Louis Romano, *With Death, Hope That Life Goes On; On the Eve of an Execution, Victims Yearn for Peace at Last*, Wash. Post, Aug. 8, 1996, at A1, available at 1996 WL 10725156.

[35] See Robert Renny Cushing & Susannah Sheffer, *Dignity Denied: The Experience of Murder Victims' Family Members Who Oppose the Death Penalty*. Published by Murder Victims' Families for Reconciliation, 2002.

[36] NOVA brief at 13.

[37] NOVA brief at 8.

[38] NOVA brief at 11.

assumptions that the survivors who might be affected by a holding that *Ring* should be applied retroactively have "found resolution," believe that they were "promised" resolution in the form of an execution, or have failed to attain a level of acceptance of their loss such that a re-sentencing proceeding would be "disastrous." The NOVA brief does not speak for all victims, and in fact specifically misrepresents the opinions and needs of the victims represented by this brief. Amici Susan Hill and Sally Schauble in particular would have the death sentences of their family members' killers overturned and are writing in support of a ruling that would bring that result.

Amici respectfully request this Court to rule for Respondent in this case.

Respectfully submitted,

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